APPENDIX "A"

UNITED STATES of America,
Plaintiff-Appellee,

v.

James Gibson TUCKER, Jr.,
Defendant-Appellant.

No. 81-3754

United States Court of Appeals,
Fifth Circuit

Sept. 1, 1982.

Defendant was convicted in the United States District Court for the Eastern District of Louisiana, Peter Hill Beer, J., for willfully failing to pay income taxes, 524 F.Supp. 748, and he appealed. The Court of Appeals, Clark, Chief Judge, held that: (1) evidence was sufficient to support District Court's finding that defendant's failure to pay taxes was "willful" under statute; (2) financial inability to pay the tax when due was not a prerequisite to criminal liability; and (3) defendant was not entitled to evidentiary hearing on issue of selective prosecution.

Affirmed.

1. Internal Revenue 5300

Evidence was sufficient to support district court's finding that defendant's failure to pay income taxes was

"willful" under statute. 26 U.S.C.A. § 7203.

2. Internal Revenue 5300

As used in statute proscribing the failure to pay income taxes, term "willful" means a voluntary, intentional violation of a known legal duty; to act willfully is to act voluntarily, purposefully, deliberately and intentionally, as distinguished from accidentally, inadvertently, or negligently, and a taxpayer's good or evil motive is not relevant in determining whether his act was willful under the statute. 26 U.S.C.A. § 7203.

See publication Words and Phrases for other judicial constructions and definitions.

3. Internal Revenue 5262

Absent exceptional circumstances, mere unavailability of liquid assets on tax due date does not excuse criminal liability under statute proscribing the failure to pay income taxes. 26 U.S.C.A. § 7203.

4. Criminal Law 31

In order to show that he has been selectively prosecuted in violation of his constitutional rights, a party must prove that others similarly situated were not prosecuted, and that defendant's selection for prosecution was based on some impermissible consideration such as race, religion, or an improper desire to prevent him from exercis-

ing his constitutional rights.

5. Criminal Law 31

Defendant, who had not demonstrated or even alleged that he was selectively prosecuted for an improper reason, was not entitled to a hearing on the issue.

Arthur A. Lemann, III, William A. Neilson, New Orleans, La., for defendant-appellant.

Howat A. Peters, Jr., Asst. U.S. Atty., New Orleans, La., for plaintiff-appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before CLARK, Chief Judge, GEE and GARZA, Circuit Judges.

CLARK, Chief Judge:

Appellant James Gibson Tucker, Jr., was convicted in federal district court for willfully failing to pay income taxes during 1975, 1976 and 1977 in violation of 26 U.S.C. § 7203. On appeal, Tucker, argues that the evidence was insufficient to support his conviction, that the district court applied an improper standard in determining "willfulness," and that he was selectively prosecuted in violation of his constitutional

rights. We reject all three arguments and affirm the judgment of the district court. 524 F.Supp. 748.

Tucker, an attorney, failed to file income tax returns for 1962, 1963 and 1964. He was indicted for failing to file the returns. He pleaded *nolo contendere* and received a suspended sentence and a $9,000 fine. Between 1965 and 1969, Tucker regularly filed his income tax returns, but he consistently failed to pay the tax liability disclosed on these returns. Indeed, Tucker has not made a full and voluntary payment of his taxes since 1962. His current balance of unpaid taxes, not including penalties and interest, is $198,184.98.

The Internal Revenue Service undertook collection efforts in 1970. The IRS and Tucker entered into at least three settlement agreements between 1970 and 1978, all of which were subsequently broken by Tucker. From 1972 to 1974, the IRS collected most of the inheritance Tucker otherwise would have received from his mother's estate. It also seized the majority of the salary Tucker was to receive for his National Guard service. Several voluntary payments were made throughout the period, but the payments fell far short of satisfying Tucker's debt to the government.

In 1975, Tucker had an acknowledged taxable income of no less that $29,198.69 on which he owed no less than $10,043.65 in federal income tax. In 1976, he had a taxable income of no less than $51,631.56 on which he owed at least $24,626.11. In 1977, he had a taxable income of no less than

$30,994.38, on which he owed at least $12,011.37. There was no dispute that Tucker failed to satisfy his tax obligations in these three years.

Tucker made several expenditures for luxuries between 1975 and 1978. These expenditures included two trips to the Virgin Islands and one trip to Guadalajara, Mexico. He spent several thousand dollars on jewelry, a new pleasure boat and a new car for his son. He was a dues-paying member of both the Ambassador Club and the New Orleans Athletic Club. He also made several payments totalling more than $2,000 to a woman he was dating at the time.

[1] In 1978, the IRS made Tucker the subject of a criminal investigation. A three-count indictment was handed down on August 5, 1981, charging Tucker with willfully refusing to pay his income tax for the years 1975, 1976 and 1977 in violation of 26 U.S.C. § 7203. Following a bench trial in district court, he was convicted on all three counts.

Tucker first argues that the evidence was insufficient to support the district court's finding that his failure to pay taxes was "willful" under 26 U.S.C. § 7203. In reviewing the sufficiency of the evidence, this court must ask itself whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); *United States v.*

Khamis, 674 F.2d 390, 393 (5th Cir. 1982). We conclude that a rational trier of fact could have found that Tucker's failure to pay income tax was willful and in violation of 26 U.S.C. § 7203 beyond a reasonable doubt. We therefore reject Tucker's first argument.

[2] 26 U.S.C. § 7203 requires the government to prove that the defendant had a duty to pay income tax, that he failed to pay the tax, and that the failure to pay was willful. Only the willfulness issue was seriously contested below. As used in § 7203, the term "willful" means a voluntary, intentional violation of a known legal duty. *United States v. Pomponio*, 429 U.S. 10, 12, 97 S.Ct. 22, 23, 50 L.Ed.2d 12 (1976); *United States v. Bishop*, 412 U.S. 346, 360, 93 S.Ct. 2008, 2017, 36 L.Ed.2d 941 (1973); *United States v. Buckley*, 586 F.2d 498, 504 (5th Cir.), *cert. denied*, 440 U.S. 982, 99 S.Ct. 1792, 60 L.Ed.2d 242 (1978). To act willfully is to act voluntarily, purposefully, deliberately and intentionally, as distinguished from accidentally, inadvertently, or negligently. *United States v. Merritt*, 639 F.2d 254, 286 n.2 (5th Cir. 1981); *United States v. Smith*, 618 F.2d 280, 282 (5th Cir.), *cert. denied*, 449 U.S. 868, 101 S.Ct. 203, 66 L.Ed.2d 87 (1980); *Edwards v. United States*, 321 F.2d 324, 325 (5th Cir. 1963), *cert. denied*, 379 U.S. 1000, 85 S.Ct. 721, 13 L.Ed.2d 702 (1964). A taxpayer's good or evil motive is not relevant in determining whether his act was willful under § 7203. *United States v. Pomponio*, 429 U.S. 10, 12, 97 S.Ct. 22, 23, 50 L.Ed.2d 12 (1976); *United States v. Quimbey*, 636 F.2d 86, 90 (5th Cir. 1981).

A rational trier of fact could have found that Tucker voluntarily and intentionally violated his known legal duty to pay his taxes. We find abundant evidence of willfulness in the record. Tucker has not timely paid his full income tax since 1962. He made several luxury expenditures during the years in question. He is a highly skilled attorney of considerable intelligence and mental resource. There is no indication whatsoever in the record that he did not know of his legal duty to pay taxes. There is every indication that his illegal failure to pay taxes was voluntary and intentional. We therefore reject Tucker's first argument.

Tucker's second argument is that, in order to show willfulness under § 7203, the government must prove that the taxpayer was financially able to pay his tax debt when it came due. Tucker argues that he was unable to pay his taxes when due because his checking accounts had either very low or negative balances, and because he had no other assets available to satisfy the debt. He thus concludes that his failure to pay was not willful. This argument borders on the ridiculous. Every United States citizen has an obligation to pay his income tax when it comes due. A taxpayer is obligated to conduct his financial affairs in such a way that he has cash available to satisfy his tax obligations on time. As a general rule, financial ability to pay the tax when it comes due is not a prerequisite to criminal liability under § 7203. Otherwise, a recalcitrant taxpayer could simply dissipate his liquid assets at or near the time when his taxes come due and thereby evade criminal liability.

Tucker cites decisions from other courts to the contrary. There is dicta in *United States v. Andros*, 484 F.2d 531, 533-34 (9th Cir. 1973), to the effect that a taxpayer may not be found guilty under § 7203 unless he possesses sufficient funds to be able to meet his legal obligations to the government on or about the tax due date. The court, however, went on to conclude that the taxpayer *did* have the financial wherewithal to pay his taxes on the relevant date, and held that he had violated § 7203. In *United States v. Goodman*, 190 F.Supp. 847, 856 (N.D.Ill.1961), the court stated that a taxpayer has no obligation to prefer the government as a creditor, or borrow money or agree to an assignment of his wages in order to pay his income tax liabilities on time. We are not bound by these decisions. *See United States v. Dawson*, 576 F.2d 656, 659 (5th Cir.), *cert. denied*, 439 U.S. 1127, 99 S.Ct. 1043, 59 L.Ed.2d 88 (1978). To the extent they are contrary to our holding today, we refuse to follow them.

[3] Absent exceptional circumstances not present here, we conclude that mere unavailability of liquid assets on the tax due date does not excuse criminal liability under § 7203. We therefore refuse to reverse Tucker's conviction on this ground.

[4,5] Tucker's third argument is that the district court erred in not granting him an evidentiary hearing on the issue of selective prosecution. In order to show that he has been selectively prosecuted in violation of his constitutional rights, a party must prove (1) that others similarly situated

were not prosecuted, and (2) that the defendant's selection for prosecution was based on some impermissible consideration, such as race, religion, or an improper desire to prevent him from exercising his constitutional rights. *United States v. Rice*, 659 F.2d 524, 526 (5th Cir. 1981); *United States v. Tibbetts*, 646 F.2d 193, 195 (5th Cir. 1981). Tucker has failed to satisfy this two-pronged test. Although prosecutions such as this one are rare, so are tax histories such as Tucker's. Furthermore, Tucker has not demonstrated, or even alleged, that he was selectively prosecuted for an improper reason. We therefore reject Tucker's third argument.

We have considered Tucker's three arguments and find them to be without merit. His conviction is

AFFIRMED.

APPENDIX "B"

UNITED STATES of America

v.

James Gibson TUCKER, Jr.

Crim. A. No. 81-297.

United States District Court
E.D. Louisiana

Oct. 23, 1981

Government brought action against taxpayer who allegedly failed to pay his income taxes. The District Court, Beer, J., held that even though taxpayer had made payments in years in which he had taxable income, he could be convicted of willfully failing to pay his tax, where he had knowingly and understandingly signed an allocation agreement that payments which had been made would be used for prior tax obligations.

Ordered accordingly.

1. Internal Revenue 4810

Taxpayer was fully apprised and fully aware of basic important aspects of allocation agreement entered into by him with the IRS so that he knew and fully understood that the monies being derived from all voluntary and involuntary payments, including levies against his National

Guard pay, were allocated to taxes, penalties and interest previously due and owing and were not being and would not be applied against or in any way used to reduce his acknowledged tax liabilities for the calendar years 1975, 1976 and 1977.

2. Internal Revenue 5291

Government's burden of proof with respect to taxpayer's criminal liability did not require primary showing of all-out exhaustion of levying activities prior to the institution of criminal proceedings.

3. Internal Revenue 5291

Government's burden of proof did not include a necessity to show that taxpayer actually was in possession of cash or other assets sufficient to satisfy his tax indebtedness as of moment that tax became due and owing.

4. Internal Revenue 5262

Even though taxpayer had made payments in years in which he had taxable income, he could be convicted of willfully failing to pay his taxes, where he had knowingly and understandingly signed an agreement that payments which he had made would be used for prior tax obligations.

Michael Schatzow, New Orleans, La., for plaintiff.

Arthur A. Lemann, III, New Orleans, La., for defendant.

BEER, District Judge.

The following verdict includes findings and conclusions which shall be considered as special findings in accordance with defense counsel's timely request for same.

1. James Gibson Tucker, Jr., defendant, was, at the times pertinent, within the jurisdiction of this court.

2. In the year 1975, Mr. Tucker had a timely acknowledged taxable income of no less than $29,198.69, on which he owed timely acknowledged income tax in an amount not less than $10,043.65, which he was required to pay on or before April 15, 1976.

3. In the year 1976, Mr. Tucker had a timely acknowledged taxable income of no less than $51,631.56, on which he owed timely acknowledged income tax in an amount not less than $24,626.11, which he was required to pay on or before April 15, 1977.

4. In the year 1977, Mr. Tucker had a timely acknowledged taxable income of no less than $30,994.38, on which he owed timely acknowledged income tax in an amount not less than $12,011.37, which he was required to pay on or before April 17, 1978.

5. Commencing in 1970 and continuing intermittently thereafter, certain levies were imposed by the Internal Revenue Service (hereafter "IRS") which produced various payments from Mr. Tucker from both his earning certain monies from National Guard service performed on some weekends and during two-week summer periods and as a result of the opening of his mother's estate after her death in 1971.

[1] 6. Additionally, substantial cash funds were paid by Mr. Tucker to the IRS to reduce his long outstanding previously unpaid debt. These payments, as well as the above noted levies and the payment resulting therefrom, were applied against various delinquent taxes, interest and penalties (which had previously accrued) in general accordance with an allocation arrangement which the defendant, Mr. Tucker, had entered into with the IRS. I am of the view, beyond a reasonable doubt, that the defendant, Mr. Tucker, was fully apprised and fully aware of the basic important aspects of the allocation arrangement noted above so that there is no reasonable doubt in my mind that he knew and fully understood that the monies being derived from all voluntary and involuntary payments including levies against his National Guard pay were allocated to taxes, penalties and interest previously due and owing and were not being (and would not be) applied against or in any way used to reduce his acknowledged tax liabilities for the calendar years 1975, 1976 and 1977 except as hereafter noted. It serves no useful purpose to embark upon a lengthy discussion of Mr. Tucker's previous travails with

the IRS. The prior criminal proceedings in which he was convicted are of record and the rocky history of subsequent prolonged and drawn out partial payments, levies, arrangements, etc. following that criminal conviction are much discussed in this record. It is sufficient here to observe that I find, beyond a reasonable doubt, that such prior obligations as did, then and there, exist, form no excusable basis whatsoever for the conduct or course of action hereafter discussed with respect to taxes due for calendar years 1975, 1976 and 1977.

[2] 7. A certain amount of bureaucratic machinations and prosecutorial inhibition apparently provoked an equivocal view on the part of the IRS with respect to the institution of levying procedures against funds held by the law firm of Tucker & Schonekas in which Mr. Tucker was a 50% partner. I conclude that the government's burden of proof with respect to the defendant's criminal liability does not require a primary showing of all-out exhaustion of levying activities prior to the institution of criminal proceedings and, thus, find no reason to further discuss the civil remedies taken or not taken by the IRS.

8. I conclude that no payments, either voluntary or involuntary, have been made by Mr. Tucker with respect to the taxes due and owing the IRS for the calendar years 1975, 1976 and 1977 except for insignificant involuntary withholdings from wages paid for National Guard service as follows: 1975—$158.53; 1976—$251.66; 1977—$186.84.

[3] 9. I reject the contention by able counsel for the defendant that the government's burden of proof includes a necessity to show that the defendant actually was in possession of cash or other assets sufficient to satisfy his tax indebtedness as of the moment that the tax became due and owing on April 15, 1976, April 15, 1977 and April 17, 1978.

[4] 10. The defendant did, beyond a reasonable doubt on my part, willfully fail to pay the taxes due for the years here at issue. This is not to say that Mr. Tucker's actions do not portray a certain dignity of straightforwardness, coupled with reasonable cordiality and some elements of cooperation, nor is it to say that Mr. Tucker did not conduct his affairs with certain basic threads of disclosure and lack of concealment. However, I have no reasonable doubt that his actions with respect to his failure to pay were done with such stubborn purpose and in such an intractable, headstrong, intentional, knowing and purposeful way as to portray a highly skilled attorney of very considerable intelligence and mental resource embarked upon a distinct, categoric course of action calculated to have a clearly predisposed result—that result being the nonpayment of the taxes due and owing as specifically alleged in counts 1, 2 and 3 of the charge.

11. I conclude beyond reasonable doubt that a fair consideration of defendant's testimony on direct and cross examination supports these conclusions. I am obliged to reject the defendant's testimony that he did not willfully fail

to pay. I believe that his failure was entirely willful even though he now seeks to rationalize his actions with excuses which I deem to be without merit. I have drawn on my own resources, including my own practical common sense and my own basic store of knowledge and experience, and, in doing so, I have no reasonable doubt that Mr. Tucker's actions which resulted in nonpayment were willful within the legal definitions properly to be applied to that term in this criminal proceeding.

This conclusion is based upon thoughtful consideration of all of the evidence, resulting in an acceptance, among other points made, of the government's contention that the defendant's course of conduct in the fiscal operation of his law office activities, as well as of his acquisition and spending patterns, far transcend a mere failure to measure up to some sort of prescribed standard of taxpayer conduct or to prefer the government as a creditor.[1]

Though it has been argued that this case falls within the shadow of imprisonment for debt, I reject that contention, being of the considered view that the facts of this case cause it to fall within the shadow of imprisonment for willful acts of calculated defiance by one who is well trained in the law. The application of the law is totally impersonal. Thus, neither years of dedicated National Guard weekend and summer service nor vigorous, talented participation in

[1] In connection with this and other points hereinabove discussed, I have read and considered *U.S. v. Goodman*, 190 F.Supp. 847, *U.S. v. Palermo*, 259 F.2d 872 (2nd Cir.); *U.S. v. Andros*, 484 F.2d 531 (9th Cir.) and *U.S. v. Bishop*, 412 U.S. 346, 93 S.Ct. 2008, 36 L.Ed.2d 931 (1973).

newsworthy and politically important litigation forms any sort of reasonable or acceptable excuse for such calculated defiance. We all stand equally before the laws of the United States and can obtain no personal exception or excuse based upon the representation that we have performed significant National Guard service or expended time, effort, energy and professional expertise in causes which we deem politically important. Equally without merit is the defendant's contention that these various services were so compelling and distracting in nature as to form some sort of basis for excusable neglect for the payment of taxes due and owing. Likewise, though it is quite apparent that Mr. Tucker was seriously and painfully injured in 1972, I find no connexity or relationship between that event and the willful failure to pay taxes due and owing for the calendar years 1975, 1976 and 1977.

Accordingly, based upon the above and with full understanding of the painful duty that evolves upon me in this connection, I find the defendant guilty as charged with respect to count 1, count 2 and count 3. The defendant shall be released upon the same bond as has been in effect heretofore, and sentencing is set for the 18th day of November, 1981, at 9:30 a.m.

APPENDIX "C"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 81-3754

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JAMES GIBSON TUCKER, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion September 1, 1982, 5 Cir., 198__, __F.2d__).

(October 12, 1982)

Before CLARK, Chief Judge, GEE and GARZA, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehear-

ing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

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United States Circuit Judge